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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SCOTT P. FAGG,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR WRIT OF CERTIORARI

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June 1992

QUESTION PRESENTED

Whether the Court of Military Appeals erred in concluding that *Bowers v. Hardwick*, 478 U.S. 186 (1986) precluded judicial scrutiny and constitutional invalidation of the proscription against sodomy found in Article 125(a), Uniform Code of Military Justice (UCMJ), as applied to petitioner's private, heterosexual, noncommercial, consensual, adult oral sex.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Scott P. Fagg, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on March 24, 1992.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 34 M.J. 179 (C.M.A. 1992) (Appendix A). The opinion of the United States Air Force Court of Military Review, issued on 6 August 1991, is reported at 33 M.J. 618 (A.F.C.M.R.) (Appendix B).

JURISDICTION

The final order of the United States Court of Military Review was entered on 14 April 1992. (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1992) and 10 U.S.C.A. § 867 (a) (Supp. 1992).

CONSTITUTIONAL AND RULE FOR COURTS-MARTIAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Fourteenth Amendment of the Constitution of the United States provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

10 U.S.C. § 925(a), Art. 120(a), Uniform Code of Military Justice provides:

> Section 925. Art. 125. Sodomy
>
> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

STATEMENT OF THE CASE

On December 12, 1990 the petitioner, an eighteen-year old Air Force airman (E-2), was tried by a general court-martial composed of a military judge sitting alone at Altus AFB, Oklahoma. He pled guilty to, and was convicted of, carnal knowledge with a 14-year-old and consensual sodomy with a 16-year-old, violations of Articles 120(b) and 125(a) [10 U.S.C. §§ 920(b) and

925(a)] respectively.[1] He was sentenced to a bad conduct discharge, confinement for seven months, and reduction to airman basic (E-1).

During the guilty plea inquiry at trial, the defense and the prosecution entered into a stipulation of fact. It was agreed, with regard to the Article 125(a) sodomy charge, that the petitioner and his partner, April Coltman, engaged in mutual oral sex after Ms. Coltman turned 16 and during the course of a serious dating relationship where they saw each other almost every day. The trial court also received evidence that the petitioner and Ms. Coltman had talked of marriage and children.

The Air Force Court of Military Review reversed the petitioner's sodomy conviction and reassessed the sentence. The Court of Review held that there was a constitutional zone of privacy for heterosexual, noncommercial, private acts of oral sex between consenting adults in the military when the acts were not outweighed by any compelling governmental interest. *United States v. Fagg*, 33 M.J. 618, 619 (A.F.C.M.R. 1991). In so finding, the Court noted that "military law has long recognized that the 'wholly private moral conduct of an individual' cannot be regulated." *Fagg*, 33 M.J. at 620 *citing United States v. Snyder*, 4 C.M.R. 15, 19 (C.M.A. 1952). The Court of Review made clear that "an individual's right to engage in certain sexual activities, however, is not without limits," and that "aggravating circumstances can provide the state with a compelling interest to justify a prosecution (*e.g.*, for adultery) where the underlying act is fornication." *Fagg*, 33 M.J. at 620. Similarly, the Court of Review observed that sodomy convictions under Article 125 have been sustained "where the government's interest in prosecuting is clear; for example: the acts were not private; the acts were nonconsensual; a minor was involved; the acts were incestuous; or duty relation-

[1] He pled not guilty to, and was acquitted of, additional charges of carnal knowledge and sodomy under Articles 120(b) and 125, UCMJ.

ships/need for military discipline were shown." *Id.* at 620, 621 (citations omitted).

In this case, the Court of Review observed that the petitioner's acts took place primarily in a private home outside of Altus Air Force Base, Oklahoma, and that Oklahoma courts have interpreted the Federal Constitution to convey a right of privacy that would preclude the petitioner's prosecution in State court. *Id.* at 621 *citing Hinkle v. State*, 771 P.2d 232, 233 (Okla. Crim. App. 1986); *Post v. State*, 715 P.2d 1105 (Okla Crim. App. 1986), *cert. denied*, 479 U.S. 890 (1986). The Air Force found that "the circumstances of this case failed to reflect a compelling governmental interest to justify intruding into [the petitioner's relationship with Ms. Coltman]. The private nature of the acts avoids any threat to public morality; indeed, no harm to anyone has been shown from the appellant's conduct." *Id.* The Court concluded that the constitutional right of privacy protected the petitioner's conduct from prosecution, and noted that facts presented by this case represented the most unaggravated Article 125 case reviewed by that Court, "[o]nly had the [petitioner] and his partner been married to each other would this case present less aggravation." *Id.* The Air Force Court, in so holding, made clear that their decision did not invalidate Article 125, but rather it limited the scope of its broad language with regard to private, heterosexual, noncommercial, consensual adult sex acts absent a compelling interest to regulate such conduct. *Id.*

The Court of Military Appeals reversed the decision of the Air Force Court of Military Review and reinstated the dismissed sodomy specification. The court did so by referencing its decision in *United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992), decided the same day as the petitioner's case.[2] *United States v. Fagg*, 34 M.J. 179,

[2] In *Henderson*, the Court of Military Appeals affirmed an accused's conviction for private, noncommercial, consensual hetero-

180 (C.M.A. 1992). The Court of Military Appeals stated that although they "sympathiz[ed] with the [petitioner] regarding this particular conviction for what was unquestionably consensual conduct," the Court "[n]evertheless detect[ed] no indication from the Supreme Court which permit[ed] [them] to override the intent of Congress. *See Bowers v. Hardwick*, 478 U.S. 186 (1986)." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE COURT OF MILITARY APPEALS ERRED IN RELYING ON *BOWERS v. HARDWICK*, 478 U.S. 186 (1986), AS THAT CASE IS INAPPOSITE TO THE CONSTITUTIONAL CLAIMS OF PETITIONER.

The Court of Military Appeals erred in concluding that *Bowers v. Hardwick*, 478 U.S. 186 (1986) precluded judicial scrutiny and invalidation of the proscription against sodomy in Article 125(a), UCMJ, as applied to petitioner's private, heterosexual, noncommercial, consensual, adult oral sex. This Court explicitly noted that its opinion regarding homosexual sodomy in *Bowers* express[ed] no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy. *Bowers*, 478 U.S. at 187 n. 2. The issue before this Court in *Bowers* was Hardwick's suit challenging the statute as applied to homosexual sodomy, and thus "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . . " *Id.* at 190. It was while resolving that issue that this Court discussed

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sexual fellatio. In so doing, the Court rejected the appellant's contention that his conduct was not proscribed by Article 125(a), holding that oral copulation has been "openly and expressly prohibited in the armed force of the United States since time immemorial." 34 M.J. at 176. Although the Court recognized that Massachusetts, where Henderson's act took place, like many other states, had decriminalized private, noncommercial, heterosexual, consensual fellatio among adults, the Court declined to follow suit with regard to Article 125(a), "absent authority from the Supreme Court." *Id.* at 178.

the "limits of the Court's role in carrying out its constitutional mandate." *Id.*

Although, like the Georgia sodomy statute, *Bowers*, 478 U.S. at 187 n. 1, Article 125(a) prohibits both homosexual and heterosexual sodomy, as well as sodomy occurring between married or single heterosexual couples, the issue presented by the petitioner's case with regard to Article 125(a) is, nevertheless, quite distinct than that addressed by the Court in *Bowers*, involving as it does heterosexual sodomy. The Court of Military Appeals, however, did not analyze whether the Air Force Court of Military Review erred as a matter of law when it narrowed the construction of Article 125's broad reach by finding that private, heterosexual, noncommercial, consensual, adult oral sex was constitutionally protected from prosecution absent a compelling government interest. Instead, the Court of Military Appeals merely expropriated the reasoning in *Bowers*, which declined to "extend a fundamental right [under the Due Process Clauses of the Fifth and Fourteenth Amendments] to homosexuals to engage in acts of consensual sodomy," *Bowers*, 478 U.S. at 191-92, in order to reverse the Court of Review. *Henderson*, 34 M.J. at 177-78, via reference in *Fagg*, 34 M.J. at 180. The Court of Military Appeals' reliance on *Bowers* is therefore fundamentally flawed, as *Bowers* was not binding and was irrelevant to this case of first impression. *Bowers* simply did not *sub silentio* dispose of petitioner's case as the Court of Appeals inferred. *Fagg*, 34 M.J. at 180.

II. THE PETITIONER'S CONDUCT WAS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Had the Court of Military Appeals judicially construed the Federal Constitution as interpreted by this Court's prior cases and applied them to the petitioner's constitutional claims, the Court of Military Appeals would have upheld the Air Force Court of Military Review's decision

narrowing the scope of Article 125(a) as inapplicable to consensual, adult, heterosexual, noncommercial, acts of oral sex absent a compelling government interest. Petitioner's constitutional right of privacy for the consensual acts which occurred during his relationship with Ms. Coltman flows squarely and logically from the privacy rights recognized by this Court in, *inter alia*, *United States v. Griswold*, 381 U.S. 489 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *Carey v. Population Services*, 431 U.S. 678 (1977).

Unlike homosexual activity, the consensual heterosexual oral sex criminalization in this case is related to "family, marriage or procreation," interests characterized as fundamental by this Court under the Due Process Clause of the Fourteenth Amendment. *See Bowers*, 478 U.S. at 191 referencing *Carey*, 431 U.S. at 688-89. As for the application of Article 125(a) to single heterosexual couples, the petitioner's acts of consensual sodomy with Ms. Coltman occurred in the bedroom of her off-base house while both were engaged in a serious dating relationship. At one point the two even contemplated marriage. As with married couples, oral sex, like vaginal intercourse, constituted a common way for this intimate heterosexual couple to relate to each other.[3] "A good sex life is central to a good overall relationship," [4] and oral sex constituted

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[3] According to researchers, oral-genital sex is a basic component of heterosexual relations in the United States among both married and unmarried couples. One study found that 72% of married and unmarried heterosexual couples engage in fellatio, and 74% engage in cunnilingus, every time they had sex, frequently, or sometimes. P. Blumstein and P. Schartz, *American Couples* 236 (1983). Another study found that approximately 80% of single men and women aged 25-34 have engaged in oral-genital sex. M. Hunt, *Sexual Behavior in the Seventies* 198-99 (1974). A more recent study found that more than 90% of married couples younger than 25 had engaged in oral sex; more than 90% of heterosexual couples of all ages had engaged in oral sex. J. Reinisch, *The Kinsey Institute New Report on Sex* 132 (1990).

[4] Blumstein & Schwartz, *supra* note 3, at 193.

one way in which this couple explored the depth and meaning of their relationship. Moreover, the petitioner's heterosexual relationship with Ms. Coltman, unlike a homosexual relationship, involved "two individuals, each with a separate intellectual and emotional makeup," *Eisenstadt*, 405 U.S. at 453, for which the option to formalize their relationship in marriage and to bear or beget children was legally viable. The petitioner's conduct while courting Ms. Coltman, far from being criminal, is more akin to that which "attend the creation and sustenance of a family," *Roberts v. Jaycees*, 468 U.S. 609, 619 (1984), and is thus protected by a constitutional right of privacy. Although the "outer limits of [the right of personal privacy] have not been marked by the Court," *Carey*, 431 U.S. at 684, surely the petitioner's right to engage in consensual, adult, heterosexual, noncommercial, acts of oral sex with a person with whom he had a serious dating relationship fall within that outer limit. The petitioner's acts, under the facts of this case, involve the very kind of individual liberty which the Bill of Rights is designed to secure, dealing as it did with a "highly personal relationship" which should be afforded "a substantial measure of sanctuary from unjustified interference by the state." *Roberts*, 468 U.S. at 618. The particular association between the petitioner and Ms. Coltman was "sufficiently personal or private to warrant constitutional protection," notwithstanding the fact they were not married to each other, as this Court has "not held a constitutional protection as restricted to family members." *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). It is therefore not surprising, as noted by the Air Force Court of Military Review, that Oklahoma, where petitioner's conduct occured, found that the Federal Constitution protected acts such as the appellant's, or that this Court denied certiorari when that decision was appealed. *Hinkle v. State*, 771 P.2d 232, 233 (Okla. Crim. App. 1986), *cert. denied*, 479 U.S. 890 (1986).

Moreover, unlike the claimed fundamental right to engage in homosexual sodomy, the petitioner's claim does not threaten to take the constitutional right of privacy "down the road" to legalized "adultery, incest, and other sexual crimes . . ." *Bowers*, 478 at 195-96. In fact, the Air Force court made it abundantly clear that its decision was not implicating sodomy convictions under Article 125(a) which have been sustained "where the government's interest in prosecuting is clear; for example: the acts were not private; the acts were nonconsensual; a minor was involved; the acts were incestuous; or duty relationships need for military discipline were shown." *Fagg*, 33 M.J. at 620, 621 (citations omitted).

Not only does the Court of Military Appeal's decision uphold the constitutionality of Article 125(a)'s broad prohibition as applied in petitioner's case, it also gives military prosecutors a unconstitutional *imprimatur* for prosecutions of married military couples who engage in identical sexual behavior in the sanctity of the bedroom. The Court of Military Appeals' reasoning with regard to Article 125(a)'s constitutionality as applied to the petitioner's case is equally applicable to married couples. Specifically, this Court also "failed" to give an "indication" in *Bowers* as to the constitutionality of prosecuting marital sodomy which would permit the Court of Appeals to "override the intent of Congress" criminalizing all sodomy. *Fagg*, 34 M.J. at 180. The Court of Military Appeals' criminalization of marital sodomy occurred even though the Georgia Attorney General in *Bowers* conceded that the Georgia statute would be unconstitutional as applied to a married couple in light of the marital privilege identified by this Court in *Griswold*. *Bowers*, 478 U.S. at 218 n. 10 (Stevens, J., dissenting). The Court of Military Appeals' attempts to downplay the unconstitutionally broad reach of their opinion upholding Article 125(a) *in toto* by distinguishing between married and single couples ("we see nothing in the *Hardwick* majority opinion which suggests that the sanctity of the marital bedroom is in

jeopardy," *Henderson*, 34 M.J. at 178 n. 8) is unsupportable under this Court's precedent. In fact, this Court in *Einsenstadt* recognized that the right of privacy inured to single as well as married individuals and struck down as unconstitutional a statute forbidding the sale of contraceptives to single persons. 405 U.S. at 1038.

III. THE PETITIONER'S PROSECUTION VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AMENDMENT.

The Court of Military Appeals' failure to judicially scrutinize Article 125(a) with regard to the appellant's constitutional claims, and its corresponding reversal of the Air Force Court of Military Review, also violated the due process rights of the petitioner. The petitioner's intimate acts with Ms. Coltman occurred in Oklahoma, a state in which acts of cunnilingus and fellatio had been criminalized. *See Post*, 715 P.2d 1107-08 at n. 1. As the Air Force Court of Military Review observed, the Oklahoma statute criminalizing these acts was held by the Oklahoma Court of Criminal Appeals in 1986 to be violative of the right of privacy under the United States Constitution as applied to nonviolent, consensual activity between adults. *Post*, 715 P.2d at 1109-10, *discussed in Fagg*, 33 M.J. at 621. This constitutional protection was reaffirmed in the wake of the Court's opinion in *Bowers*, over a full year prior to the petitioner's acts with Ms. Coltman. *Hinkle*, 771 P.2d at 233.

The petitioner's prosecution and conviction for acts previously construed by the petitioner's domicile state as protected under the Federal constitution violated the Fifth Amendment's Due Process Clause. Under the Fourteenth Amendment's Due Process Clause, state convictions regarding offenses for which an accused had a lack of "fair warning" resulting from an unforeseeable and retroactive judicial expansion are unconstitutional. *Bouie v. Columbia*, 378 U.S. 347, 352 (1964). This is true whether the unforeseeable construction is of either "a narrower and

precise statutory language," *Bouie*, 378 U.S. at 352, or of a statute involving "sweeping language" whose "reach has been confined within the constitutional limits announced by this Court." *Marks v. United States*, 430 U.S. 188, 195 (1977). In both situations, the underlying principle is identical: "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a state supreme court is barred by the Due Process Clause from achieving the same result by judicial conviction." *Bouie*, 378 U.S. at 353. This same principle is applicable to interpretations of federal statutes.

Petitioner was unconstitutionally lulled "into a false sense of security." *Bouie*, 378 U.S. at 352. Petitioner had no reason to suspect that the Federal Constitution, which confined the reach of the sodomy statute in his domicile state and protected his acts there from prosecution, would subsequently be interpreted as failing to accord him the same protection when prosecuted via an Air Force court-martial. The fact that the petitioner was tried at Altus Air Force Base instead of the corresponding state court for the town of Altus, Oklahoma does not defeat the petitioner's due process claim, as alluded to by the Court of Military Appeals in *Fagg*, 34 M.J. at 180, when it relied on *Henderson*, 34 M.J. at 178 (although Massachusetts did not deem fellatio criminal, the Court of Military Appeals gauged the case against Federal statute and Constitution). Unlike the case in *Henderson*, the petitioner's domicile state found acts such as the petitioner's protected by the Federal, not state, Constitution. *Hinkle*, 771 P.2d at 233; *Post* 715 P.2d at 1109-10. Additionally, when rejecting a judicial *ex post facto* constitutional attack on a broadly written Tennessee statute judicially interpreted as proscribing sodomy, this Court, *inter alia*, looked to other jurisdictions and found that they had already reasonably construed identical statutory language to apply to the challenged acts. *Rose v. Locke*, 423 U.S. 48 (1978). Such an analysis supports the peti-

tioner's due process claim in this case. Not only had the state in which the petitioner's acts took place previously found the Federal Constitution narrowed Oklahoma's proscription against sodomy, the petitioner's adult, private, consensual, noncommercial, heterosexual acts would not be criminal in the vast majority of states.[5] Moreover, the Air Force's failure to enforce Article 125(a)'s prohibition against consensual sodomy as applied to private, noncommercial, consensual, heterosexual, adult sodomy absent a compelling government interest,[6] also added to

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[5] In fact, only seventeen states have statute on the books which criminalize both heterosexual and homosexual sodomy. Ala. Code § 13A-6-65(a)(3) (1982); Ariz. Rev. Stat. Ann. §§ 13-1411, 13-1412 (1989); D.C. Code Ann. § 22-3502 (1989); Fla. Stat. Ann. § 800.02 (1976) (deviate sexual intercourse) (Florida now punishes sodomy under this statute after its sodomy statute (§ 800.01) was declared unconstitutional in *Franklin v. State*, 257 So.2d 21 (Fla. 1971)); Ga. Code Ann. § 16-6-2 (Michie 1988); Idaho Code § 18-6605 (1987); La. Rev. Stat. Ann. § 14:89 (West 1986); Md. Ann. Code art. 27, §§ 553, 554 (1992); Mich. Comp. Laws Ann. § 750.158 (West 1991); Minn. Stat. Ann. § 609.293 (West 1987); Miss. Code Ann. § 97-29-59 (1973); N.C. Gen. Stat. § 14-177 (1991); Okla. Stat. Ann. tit. 21, § 886 (West 1983); R.I. Gen. Laws § 11-10-1 (1981); S.C. Code Ann. § 16-15-120 (Law. Co-op. 1985); Utah Code Ann. § 76-5-403 (1990); Va. Code Ann. § 18.2-361 (Michie 1988). Moreover, the constitutionality of these statutes, under either the respective state or the Federal Constitution, is an open question. *See e.g., Schochet v. State*, 580 A.2d 176 (Md. 1990) (narrowing Maryland's broad sodomy statute).

Seven states criminalize only homosexual sodomy. Ark. Code Ann. § 5-14-122 (Michie 1987); Kan. Stat. Ann. § 21-3505 (1988); Ky. Rev. Stat. Ann. § 510.100 (Michie/Bobbs-Merrill 1990); Mo. Ann. Stat. § 566.090 (Vernon 1979); Mont. Code Ann. §§ 45-5-505, 45-2-101(20) (1991); Nev. Rev. Stat. Ann. § 201.190 (Michie 1986); Tenn. Code Ann. § 39-13-510 (1991).

[6] In fact, in the last five years, there had been 36 cases of violations of Article 125(a) prosecuted. Memorandum from Air Force Legal Services Center, Military Justice Division, Personnel Accused of Sodomy—Other Cases (June 6, 1992) (on file with Air Force Legal Services Agency, Appellate Defense Division). Of these, 14 involved homosexual activity, 22 involved heterosexual activity. Of those prosecuted for heterosexual activity, the sodomy charge was

the petitioner's lack of fair warning that his intimate conduct with Ms. Coltman would be prosecuted, as does the fact that previously published Court of Military Appeals cases in this area involved charges that were referred against an accused for sodomy "by force and without consent," *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979), or involved fellatio which occurred in a public place, *United States v. Scoby*, 5 M.J. 160, 164 (C.M.A. 1978).

The petitioner's prosecution also violated the Equal Protection Clause of the Fifth Amendment. Petitioner was prosecuted for violating Article 125(a) despite the fact that there is no evidence that any married couple has ever been prosecuted by the Air Force for engaging in the same acts.[7] *Eisenstadt* struck down as violative of the Equal Protection Clause of the Fourteenth Amendment a Massachusetts law distinguishing between married and single persons with regard to access to birth control because there was no difference that rationally explained the different treatment accorded married and unmarried persons. *Eisenstadt*, 405 U.S. at 1038. Similarly, there is no difference which explains why an unmarried person such as the petitioner has been subject to prosecution in this case under Article 125(a) when married persons have not been. Accordingly, the dissimilar treatment afforded the petitioner and married persons in terms of Article 125(a)'s enforcement violated the Equal Protection Clause of the Fifth Amendment.

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within the context of an adulterous relationship, in a public or semi-public place, involved superior-subordinate military contact, involved family members or minors, or a combination of the above. None involved married parties, or was similar to the private, heterosexual, noncommercial acts engaged in by the petitioner and Ms. Coltman in which a military government interest was so utterly lacking. Due to the logistics involved, this inquiry delved into the past 5 years, but we expect a more exhaustive investigation would have yielded similar results.

[7] *See supra* note 6.

CONCLUSION

The petitioner's case is a worthy one for a grant of certiorari. Review of this case is imperative to resolve the issue left undecided in *Bowers*: the constitutionality of applying sodomy laws to heterosexual oral sex. The decision below erroneously relied exclusively on *Bowers* to reverse the Air Force Court of Military Review's opinion granting constitutional protection to private, consensual, heterosexual, noncommercial adult sodomy. Unlike the claimed homosexual right to engage in sodomy rejected in *Bowers*, heterosexual oral sex is inextricably intertwined with interests involving marriage, family, and procreation. These heterosexual acts are thus deserving of constitutional privacy protection against government intrusion absent a compelling government interest, a protection which was stripped from military married and single couples by the decision below. The petitioner's case should also be reviewed because his prosecution for acts protected by the Federal Constitution in his domicile state violated the Fifth Amendment's Due Process Clause, and the Air Force's decision to enforce Article 125(a) against the petitioner, but not married couples (thus far), violates the Equal Protection Clause of the Fifth Amendment.

Respectfully submitted,

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June 1992

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 67,216

ACM 29129

UNITED STATES,

Appellant

v.

SCOTT P. FAGG, Airman, U.S. Air Force,

Appellee.

Argued Dec. 5, 1991

Decided March 24, 1992

For the Accused: *Captain Beverly B. Knott* (argued); *Colonel Jeffrey R. Owens* (on brief).

For the United States: *Major Paul H. Blackwell, Jr.* (argued); *Lieutenant Colonel Brenda J. Hollis* (on brief); *Captain James C. Sinwell.*

Opinion of the Court

COX, Judge:

This case is a companion to *United States v. Henderson*, 34 MJ 174 (CMA 1992), also decided this day. As in *Henderson*, the issues before us concern the constitutionality of Article 125(a), Uniform Code of Military Justice, 10 USC § 925(a), which proscribes "sodomy," statutorily defined as "unnatural carnal copulation with

another person of the same or opposite sex or with an animal." For the reasons stated in *Henderson*, we uphold the constitutionality of Article 125(a).

The accused was convicted, in accordance with his pleas, of one specification of consensual sodomy (fellatio and cunnilingus) and one specification of carnal knowledge [Art. 120(b), UCMJ, 10 USC § 920(b)]. A military judge sitting alone as a general court-martial at Altus Air Force Base, Oklahoma, sentenced the accused to a bad-conduct discharge, confinement for 7 months, and reduction to airman basic, which the convening authority approved. At the Court of Military Review, the accused argued that the sodomy conviction should be reversed, and the majority of that court agreed, "recogniz[ing] a constitutional zone of privacy for heterosexual, noncommercial, private acts of oral sex between consenting adults." 33 MJ 618, 619 (1991).

The Acting Judge Advocate General of the Air Force certified these issues for review:

I

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED WHEN IT RECOGNIZED A "CONSTITUTIONAL ZONE OF PRIVACY FOR HETEROSEXUAL, NONCOMMERCIAL, PRIVATE ACTS OF ORAL SEX BETWEEN CONSENTING ADULTS," THEREBY SETTING ASIDE AN ARTICLE 125 SODOMY CONVICTION.

II

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED WHEN IT HELD THAT THERE MUST BE A COMPELLING GOVERNMENTAL INTEREST IN ORDER TO SUSTAIN A CONVICTION UNDER ARTICLE 125 FOR A PRIVATE, HETEROSEXUAL, NONCOMMERCIAL, CONSENSUAL ADULT ORAL SEX ACT.

In reality, it would appear that sodomy had little bearing on sentence. By his own unabashed account, the accused, an 18-year-old airman, cut a rather wide swath through the pubescent female population of Altus, Oklahoma, in his first year after basic training. Unfortunately for him, his quest led him a little too close to the cradle on one occasion—with a 14-year-old junior high school student. In the military, carnal knowledge (sexual intercourse with a female under age 16) carries a maximum punishment of dishonorable discharge, confinement for 15 years, reduction, and total forfeitures. Para. 45a(2), Part IV, Manual for Courts-Martial, United States, 1984.

Be that as it may, for the reasons announced in *Henderson*, we reverse that portion of the Court of Military Review's decision setting aside the sodomy conviction, and we reinstate it. Like Judge James, dissenting below, we may sympathize with the accused regarding this particular conviction for what was unquestionably consensual conduct.* Nevertheless, we detect no indication from the Supreme Court which permits us to override the intent of Congress. *See Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986).

The decision of the United States Air Force Court of Military Review dismissing the sodomy specification and reassessing the sentence is reversed. The findings of guilty of sodomy (the Additional Charge and its specification) and the original sentence are reinstated. The record of trial is returned to the Judge Advocate General of the Air Force for remand to that court for fur-

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* Ironically, it was the accused's jilted 16-year-old partner in sodomy who reported him to the police, after he had left her first for another 16-year-old and then for the 14-year-old. Before the complaint was lodged, however, the accused had already moved on to an 18-year-old, whom he married on the eve of his Article 32, Uniform Code of Military Justice, 10 USC § 832, investigation, after a 2-month acquaintanceship.

ther review of the approved findings and the original sentence under Article 66(c), UCMJ, 10 USC § 866(c).

Chief Judge SULLIVAN, Judges CRAWFORD and GIERKE, and Senior Judge EVERETT concur.

Judge WISS did not participate.

APPENDIX B

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 29129

UNITED STATES

v.

AIRMAN SCOTT P. FAGG, FR414-47-3344
United States Air Force

Sentence Adjudged 12 Dec. 1990

Decided 6 Aug. 1991

Appellate Counsel for the Appellant: Captain Beverly B. Knott (argued), Lieutenant Colonel Jeffrey R. Owens, and Major G. Michael Lennon.

Appellate Counsel for the United States: Colonel William T. Hoffman (argued), Colonel William R. Dugan, Jr., and Major Paul H. Blackwell, Jr.

Before LEONARD, RIVES and JAMES, Appellate Military Judges.

OPINION OF THE COURT

RIVES, Judge:

Today we recognize a constitutional zone of privacy for heterosexual, noncommercial, private acts of oral sex between consenting adults. Since that right to privacy is not outweighed by any compelling governmental inter-

est under the facts of this case, we reverse the appellant's sodomy conviction.

The appellant, Airman Scott P. Fagg, was 18 years old when he engaged in sexual acts with young women he was dating. Facing court-martial charges for some of those acts, he pleaded guilty to carnal knowledge with a 14-year-old and sodomy with a 16-year-old. He elected trial by military judge alone at his general court-martial. His adjudged and approved sentence is a bad conduct discharge, confinement for 7 months, and reduction to E-1.

Airman Fagg admitted engaging in oral sex (both cunnilingus and fellatio) on numerous occasions with his 16-year-old girlfriend, who is treated as an adult for these purposes under military law. Article 125, 10 U.S.C. § 925 proscribes "unnatural carnal copulation with another person of the same or opposite sex." The article's broad statutory language prohibits all sodomy, whether consensual or forcible, private or public, heterosexual or homosexual. The Manual for Coutrs-Martial finds particular aggravation for sentencing when the act is "done with a child under the age of 16" or when it is done "by force and without the consent of the other person." MCM, Part IV, paragraph 51b(2) and (3) (1984); *see also* MCM, Part IV, paragraph 51e (1984) (providing increased punishments when such aggravation is proven).

The Article 125 prohibition of "unnatural carnal copulation" has withstood attacks that it is unconstitutionally vague. *United States v. Scoby*, 5 M.J. 160 (C.M.A.1978). The term "unnatural carnal copulation" has been defined to include both fellatio and cunnilingus. *United States v. Harris*, 8 M.J. 52 (C.M.A.1979). At issue in this case is whether a private, consensual, heterosexual, adult act of oral sodomy can be prosecuted as a violation of Article 125.

The appellant urges that applying Article 125 to his fact situation violates his constitutional right to privacy.

Although the Constitution does not mention any specific 'right to privacy," it was noted long ago that the framers of the Constitution "sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. *They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.*" *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting) (emphasis added).

A fundamental, constitutional right to privacy was expressly recognized in *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965), when the Court held that a state could not constitutionally regulate the distribution of contraceptives to married couples. The Court reasoned that a "zone of privacy" is implicitly included among the rights that were enumerated in the Constitution. *Id.* at 484, 48 S.Ct. at 574-75.

The right to privacy was extended to unmarried persons in *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), when the Court ruled that a statute regulating distribution of contraceptives to single adults was unconstitutional. The Court observed: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453, 92 S.Ct. at 1038.

Privacy rights are not limited to matters of procreative choice. Predating *Eisenstadt* is *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), which holds that an individual's right to view obscene material in the privacy of the home cannot be regulated by the state. Thus, the Court has recognized a right of privacy, whether within or outside a marital relationship, that extends into the area of sexual intimacy.

The Supreme Court has noted that "the outer limits" of the right to privacy "have not been marked." *Carey v. Population Services International*, 431 U.S. 678, 684, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977). It has been determined, however, that the right to privacy does not protect an accused charged with homosexual sodomy. *Bowers v. Hardwick*, 478 U.S. 186, 190, 196, 106 S.Ct. 2841, 2846-47, 92 L.Ed.2d 140 (1986). While the statute at issue in *Bowers* (like Article 125) prohibits all acts of sodomy, the Court carefully limited its ruling: "We express no opinion on the constitutionality of the . . . statute as applied to other acts of sodomy." *Id.* at 188 n. 2, 106 S.Ct. at 2842 n. 2. Addressing this point in his dissent, Justice Stevens stated it was clear to him that a state "may not prohibit sodomy within 'the sacred precincts of marital bedrooms,' *Griswold*, 381 U.S., at 485 [85 S.Ct. at 1682], or, indeed, between unmarried heterosexual adults. *Eisenstadt*, 405 U.S., at 453 [92 S.Ct. at 1038]." *Bowers*, 478 U.S. at 218, 106 S.Ct. at 2858.

When a fundamental personal liberty (such as the right to privacy) is involved, that right is subject to regulation only insofar as the intrusion is necessary to promote a "compelling state interest." *See, e.g., Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed.2d 147 (1973); *Griswold*, 381 U.S. at 497-98, 85 S.Ct. at 1688-89 (Goldberg, J., concurring).

Military law has long recognized that the "wholly private moral conduct of an individual" cannot be regulated. *United States v. Snyder*, 1 U.S.C.M.A. 324, 427, 4 C.M.R. 15, 19 (1952). An individual's right to engage in certain sexual activities, however, is not without limits. Thus, while fornication per se is not a crime under the UCMJ, *United States v. Burns*, 25 C.M.R. 791, 794 (A.F.B.R.1957), *pet. denied*, 25 C.M.R. 486 (1958), aggravating circumstances can provide the state with a compelling interest to justify a prosecution (e.g., for

adultery) where the underlying act is fornication. *See United States v. Parrillo*, 31 M.J. 886 (A.F.C.M.R.1990) (aggravation provided by an officer-enlisted, supervisor-subordinate duty relationship), *pet. granted*, 33 M.J. 161 (C.M.A.1991).

Appellate courts have sustained convictions under Article 125 where the government's interest in prosecuting is clear; for example: the acts were not private, *United States v. Scoby*, 5 M.J. 160, 164 (C.M.A.1978); *United States v. Linnear*, 16 M.J. 628 (A.F.C.M.R.1983), *pet. denied*, 17 M.J. 277 (C.M.A.1983); the acts were non-consensual, *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989); *United States v. Rogan*, 19 M.J. 646 (A.F.C.M.R. 1984); *United States v. Means*, 20 M.J. 522 (A.C.M.R. 1985), *affirmed*, 25 M.J. 160 (C.M.A.1987); *United States v. Jones*, 14 M.J. 1008, 1009 (A.C.M.R.1982); a minor was involved, *United States v. Romey*, 32 M.J. 180 (C.M.A.1991); *United States v. Williams*, 25 M.J. 854 (A.F.C.M.R.1988); the acts were incestuous, *United States v. Ciulla*, 29 M.J. 868 (A.F.C.M.R.1989); or duty relationships/need for military discipline were shown, *United States v. Wilson*, 28 M.J. 48 (C.M.A.1989); *United States v. Hardy*, 30 M.J. 757 (A.C.M.R.1990); *United States v. McFarlin*, 19 M.J. 790 (A.C.M.R.1985).

We note that while sodomy was illegal in all 50 states in 1960, by 1986 only half continued to criminalize acts of sodomy occuring "in private and between consenting adults." *Bowers*, 478 U.S. at 193-94, 106 S.Ct. at 2845-46; *see generally* Annotation, *Validity of Statute Making Sodomy a Criminal Offense*, 20 A.L.R.4th 1009 (1983). The appellant's acts took place primarily in a private (off-base) home near Altus Air Force Base, Oklahoma. Of some interest is the fact that Oklahoma courts have interpreted the Federal Constitution to convey a right of privacy that would preclude this appellant's prosecution in State court. *See Hinkle v. State*, 771 P.2d 232, 233 (Okl.Crim.App.1989); *Post v. State*, 715 P.2d 1105 (Okl.

Crim.App.1986), *cert. denied*, 479 U.S. 890, 107 S.Ct. 290, 93 L.Ed.2d 264 (1986).

Analyzing the facts of this case, we find a fundamental right of sexual privacy for the appellant's consensual, adult, heterosexual, noncommercial, private acts of oral sex. The circumstances of this case fail to reflect a compelling governmental interest to justify intruding into that relationship. The private nature of the acts avoids any threat to public morality; indeed, no harm to anyone has been shown from the appellant's conduct. In the many Article 125 prosecutions this Court has reviewed, none has resulted from a fact situation as *un*aggravated as the appellant's. Only had the appellant and his partner been married to each other would his case present less aggravation. We hold that the constitutional right of privacy protects the appellant's conduct from prosecution. *See Scoby, supra*, 5 M.J. at 166.

Our decision limits the scope of Article 125; it does not invalidate the statute. We are sensitive to our status as a court, not a legislature. The statute is written in very broad language, however, and questions about its reach are raised by its silence as to the matters we find relevant here. To sustain a prosecution under Article 125 for a private, heterosexual, noncommercial, consensual adult sex act, aggravating factors that support a compelling interest to regulate such conduct must be present. *Contra United States v. Henderson*, 32 M.J. 941, 946 (N.M.C.M.R.1991).

The findings of guilty to sodomy (the Additional Charge and its specification) are set aside and dismissed. We are satisfied that we can reassess the sentence for the remaining findings of guilty. *United States v. Peoples*, 29 M.J. 426 (C.M.A.1990); *United States v. Sales*, 22 M.J. 305 (C.M.A.1986). Considering all relevant matters before the Court on the remaining charge and its specification, we approve a sentence of confinement for 7 months and reduction to the grade of E-1. Next, con-

sidering appellant's assertion that his sentence is too severe, we examine the entire record of trial and find the reassessed sentence appropriate. Article 66(c), UCMJ, 10 U.S.C. § 866(c).

The approved findings of guilty and the sentence, both as modified, are correct in law and fact and are

AFFIRMED.

Senior Judge LEONARD concurs.

JAMES, Judge, dissenting:

My brethren probably do what is best today, and their vote gives me the luxury of dissent.

The first premise in the logical argument in this case must be, "There is a constitutional right of privacy that protects consenting, heterosexual, adult, private, non-commercial, untraditional,[1] sexual activity," but there is no authority for that proposition among the decisions of the Supreme Court of the United States. It has come close in opinions about procreation, marital and family relationships, and freedom to think, but it has not yet spoken on heterosexual copulatory mechanics. Other jurisdictions have been called upon to decide the same issue, and they have split. Of all their decisions, *Schochet v. State*, 75 Md. App. 314, 541 A.2d 183 (Md.App.1988), so well states my views that I cannot improve upon its analysis and nothing of consequence has happened in the 3 years since it was written.[2] In brief, the decisions of

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[1] Non-vaginal sex. I do not overlook the recent polls and the relics of the ancient world that suggest that fellatio and cunnilingus might be as much the norm as other forms of sexual activity. Neither the polls nor mores nor morality can be at issue until one first decides whether there is a constitutional protection.

[2] The decision to which I cite was overruled by the state supreme court. *Schochet v. State*, 320 Md. 714, 580 A.2d 176 (1990). The higher court's approach and analysis do not detract from the reliability of the analysis of the intermediate court.

the Supreme Court have not yet provided enough information that its direction on this issue can be predicted. It is on precisely this point that the majority and I disagree. I must dissent. I would affirm, though with enormous reluctance.

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 67216/AF

CMR Dkt. No. 29129

UNITED STATES,

Appellee

v.

SCOTT P. FAGG (414-47-3344),

Appellant

ORDER

Because no petition for reconsideration has been filed within the period prescribed by Rule 31(a) of the Rules of Practice and Procedure, United States Court of Military Appeals, it is by the Court this 14th day of April 1992,

ORDERED:

That this Court's opinion in the above-entitled case (34 MJ 179) is now final.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (BLACKWELL)
Appellate Government Counsel (KNOTT)

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